Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

(1)

In the

supreme Court of the United States

October 1996 Term

Robert Lee Avrett, Jr.,

Petitioner

vs.

POLY-AMERICA,INC., STEVEN GRANT ROSS, STEVEN GRANT ROSS,personal capacity, JOAN M. TASKER, JOAN M. TASKER,personal capacity, WANDA WAKELAND, WANDA WAKELAND, personal capacity,EDWARD M. CAVUTO,EDWARD M. CAVUTO,personal capacity, GARY O. BOOTH, GARY O. BOOTH,personal capacity, INTERNAL REVENUE SERVICE, JOHN DOES 1 through 3, JANE DOES 1 through 3,

Respondents

Petition for Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

SUPPLEMENTAL APPENDIX

Robert Lee Avrett, Jr.
714 E. Wall St. #106
Grapevine, Texas 76051
(817) 481-0237

10 pp

LIST OF PARTIES TO THE PROCEEDING

Robert Lee Avrett, Jr., *Petitioner*

POLY-AMERICA,INC.,STEVEN GRANT ROSS,STEVEN GRANT ROSS,personal capacity,JOAN M. TASKER, JOAN M. TASKER,personal capacity, WANDA WAKELAND, WANDA WAKELAND, personal capacity, and STEVEN C. MAHAFFEY, attorney for the POLY-AMERICA defendants

EDWARD M. CAVUTO, EDWARD M.CAVUTO, personal capacity, GARY O. BOOTH,GARY O. BOOTH, personal capacity, INTERNAL REVENUE SERVICE, JOHN DOES 1 through 3,JANE DOES 1 through 3, and RANDOLPH HUTTER, attorney for INTERNAL REVENUE SERVICE defendants,

Respondents

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ROBERT L. AVRETT, JR. Plaintiff,	)	
VS.	)	NO. 4:95-CV-803-A
POLY-AMERICA, INC., ET AL, Defendants	)	

ORDER

Came on for consideration the motion of defendants Poly - America, Inc., Steven Grant Ross, Joan M. Tasker, and Wanda Wakeland ("movants") to dismiss. The court, having considered the motion, the response of plaintiff, Robert L. Avrett, Jr., titled "Plaintiff's Motion to Strike Defendants' 12(b)(6) Motion and Memorandum of Law", the record, and applicable authorities, finds that the motion should be granted. The court further finds that there is no necessity for a hearing and is, therefore, denying plaintiff's motion for hearing.

Although plaintiff attempts to argue to the contrary, his claims against movants are clearly based on their having honored levies issued by the Internal Revenue Service. Plaintiff maintains that his constitutional rights were violated by movants having honored the levies. As the Fifth Circuit has noted, the constitutionality of the income tax laws has been consistently upheld and the tax levy ptocedure in Internal Revenue Code $ 6331 does not violate due process. Burroughs v. Wallingford, 780 F 2d 502, 503 (5th Cir.1986). Movants are immune from liability to plaintiff for complying with the levies. Id. Accordingly, movants' motion to dismiss will be granted.

The court ORDERS that movant's motion to dismiss be, and is hereby, granted and that plaintiff's claims against them be, and are hereby dismissed with prejudice. The court further ORDERS that plaintiff's motion to strike defendants' motion and motion for hearing be, and are hereby denied.

The court determines that there is no reason for delay in, and hereby directs, entry of final judgement as to the dismissal of plaintiff's claims against movants.

SIGNED February 6, 1996

JOHN McBRIDE
United States District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ROBERT L. AVRETT, JR. Plaintiff,	)	
VS.	)	NO. 4:95-CV-803-A
POLY-AMERICA, INC., ET AL, Defendants	)	

FINAL JUDGEMENT AS TO DEFENDANTS
POLY-AMERICA, INC., STEVEN GRANT ROSS, JOAN M. TASKER, AND WANDA WAKELAND

In accordance with the court's order of even date herewith,
The court ORDERS, ADJUDGES, and DECREES that the claims of plaintiff, Robert L. Avrett, Jr., against defendants Poly-America, Inc., Steven Grant Ross, Joan M. Tasker, and Wanda Wakeland be, and are hereby dismissed with prejudice.
The court further ORDERS, ADJUDGES and DECREES that said defendants have and recover their court costs from plaintiff.

SIGNED February 6, 1996

JOHN McBRIDE
United States District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ROBERT L. AVRETT, JR.)
Plaintiff,)
VS.) NO. 4:95-CV-803-A
POLY-AMERICA, INC., ET AL,)
Defendants)

O R D E R

Came on for consideration the motion of defendants Edward M. Cavuto ("Cavuto"), Gary O. Booth ("Booth"), and Internal Revenue Service ("IRS") to dismiss. The court interprets the motion to strike filed by plaintiff, Robert L. Avrett, Jr., on March 14, 1996, to be a response to the motion to dismiss. Having considered the motion, the response, the record, and applicable authorities, the court finds that the motion should be granted in part.

Plaintiff's claim in this action arises out of the issuance of levies by IRS. Apparently the notices of levy were signed by Cavuto. Booth was the district director of IRS at the time the levies were issued. Plaintiff alleges generally that these defendants and others, the claims against whom have already been dismissed , conspired in some manner to deprive plaintiff of certain rights under the Constitututions of the United States and the State of Texas.

Movants maintain that the court lacks jurisdiction over this action and that , in any event, Cavuto and Booth are entitled to qualified immunity. Despite his protestations to the contrary, plaintiff's claims against Cavuto and Booth in their official Capacities and against IRS are actually claims against United States of America. Hawaii v. Gordon, 373 U.S.57, 58(1963). Plaintiff has not made any attempt to show that the United States has expressly consented to be sued. See Lehman v. Nakshian, 453 U.S. 156, 160 (1981); United States v. Mitchell, 445 U.S.535, 538 (1980). Indeed, plaintiff maintains that he is not suing the United States. Plaintiff's motion to strike, at 7, 19. Accordingly, to the extent that plaintiff's complaint could be interpreted as including claims against the United States, such claims will be dismissed.

As for plaintiff's clains against Cavuto and Booth in their individual capacities, the court finds that plaintiff should be given

an opportunity to replead to state those claims with requisite specificity. The conclusory allegations of plaintiff's complaint are insufficient to overcome the defense of qualified immunity. See Schultea v. Wood, 47 F 3d 1427 (5th Cir. 1995); Gipson v. Rosenberg, 797 F 2d 224, 226 (5th Cir. 1986), cert. Denied, 481 U.S. 1007 (1987); Henzel v. Gerstein, 608 F. 2d 654, 659 (5th Cir. 1979).

The record reflects that, on February 27, 1996, the clerk entered default against IRS at plaintiff's request. At the time the default was entered, the record did not reflect that said defendant had been properly served with the summons and complaint as required by Fed.R.Civ. P. (4) (I). In particular, the record did not show that service on IRS had been effected "by also sending a copy of the summons and of the complaint by registered or certified mail" to IRS. See Fed. R. Civ.P. 4 (I)(2). The court further notes that the return apparently intended to comply with Fed. R. Civ. P. 4 (I) (1) (A) reflects that it was directed to "United States Assistant Attorney General" and does not reflect how service was accomplished. Accordingly, default should not have been entered. See Fed. R. Civ.P. 55 (a). The court will set the default aside.

The court ORDERS that:

(1) The clerk's February 27, 1996, entry of default against IRS be, and is hereby, vacated and set aside;

(2) The motion to dismiss be, and is hereby, granted in part and plaintiff's claims against Cavuto and Booth in their official capacities and agqainst IRS be, and are hereby, dismissed;

(3) The motion to dismiss be, and is hereby, otherwise denied;

(4) By 4:30 p.m. on April 5, 1996, plaintiff file an amended complaint alleging with particularity all material facts on which he contends he will establish his right to recovery from Booth and Cavuto in their individual caapcities and which will include detailed facrs supporting the contention that their pleas of immunity cannot be sustained; and

(5) Plaintiff's motion to strike be, and is hereby, denied.

The court determines that there is no just reason for delay, and hereby directs, entry of final judgement as to the

dismissal of plaintiff's claims against Booth and Cavuto in their official capacities and against IRS.

SIGNED March 26 , 1995

JOHN McBRIDE
United States District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ROBERT L. AVRETT, JR.	)	
Plaintiff,	)	
VS.	)	NO. 4:95-CV-803-A
POLY-AMERICA, INC., ET AL,	)	
Defendants	)	

O R D E R

By order signed March 26, 1996, the court dismissed the claims of plaintiff, Robert L. Avrett, Jr., against defendant Internal Revenue Service and against defendant Edward M. Cavuto ("Cavuto") and Gary O. Booth ("Booth") in their official capacities. That left only plaintiff's claims against Cavuto and Booth in their individual capacities for determination. The court ordered that, by 4:30 p.m. April 5, 1996, plaintiff file an amended complaint alleging with particularity all material facts on which he contends he will establish his right to recovery from Booth and Cavuto in their individual capacities, including detailed facts supporting the contention that their pleas of immunitycould not be sustained. To date, plaintiff has failed to comply with the court's March 26 order. Plaintiff has either abandoned his claims or has stated his best case in his original complaint. The conclusory allegations of plaintiff's complaint, however, are insufficient to overcome the defense of qualified immunity. Accordingly, the court finds that plaintiff's against Booth and Cavuto in their individual capacities should be dismissed.

The court ORDERS that plaintiff's claims against Booth and Cavuto in their individual capacities be, and are hereby dismissed with prejudice.

SIGNED April 9, 1996

JOHN McBRIDE
United States District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ROBERT L. AVRETT, JR.	)	
Plaintiff,	)	
VS.	)	NO. 4:95-CV-803-A
POLY-AMERICA, INC., ET AL,	)	
Defendants	)	

FINAL JUDGEMENT

In accordance with the court's order of even date herewith,

The court ORDERS that the claims of the plaintiff, Robert L. Avrett, Jr., against defendants Edward M. Cavuto and Gary O. Booth in their individual capacities be, and are hereby dismissed with prejudice. The court further ORDERS, ADJUDGES and DECREES that these defendants have and recover their court costs from plaintiff.

SIGNED April 9 , 1996

JOHN McBRIDE
United States District Judge